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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE STATE OF ILLINOIS,

Petitioner,

v.

MARLA ZEGART,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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STATEMENT OF THE CASE

While the facts set forth by the Petitioner are essentially correct, they are deficient in one important respect. Contrary to the suggestions of the Petitioner, the amended bill of particulars does not purport to limit the State to using evidence of crossing the median solely to show a causal nexus between other acts of recklessness and the collision which caused death. Rather, paragraph 3 of the amended bill of particulars states that the State would introduce evidence of crossing the median not only to prove the allegations of the indictment, the Bill of Particulars, and the Additional Bill of Particulars, but also to support the State's claims that the Defendant was driving too fast for conditions, failed to reduce speed to avoid a collision, failed to drive a vehicle in the proper lane and improperly passed on the left. Similar admissions that the State intends to introduce evidence of crossing the median to substantiate the charge of reckless homicide are contained in the State's additional bill of particulars, filed in response to Respondent's Motion for additional bill of particulars. The Motion for additional bill of particulars and State's additional bill of particulars are attached to this Brief as Appendix A.

Based upon this record the Illinois Supreme Court affirmed the dismissal of the indictment.

REASONS FOR DENYING THE WRIT

THE STATE HAVING CHARGED THE RESPONDENT WITH THE OFFENSE OF CROSSING THE MEDIAN AND THE DEFENDANT HAVING PLEAD GUILTY THERETO, DOUBLE JEOPARDY BARS THE STATE FROM CHARGING RESPONDENT WITH AND TRYING HER FOR THE CRIMINAL OFFENSE OF RECKLESS HOMICIDE.

This case contains one important characteristic not found in *Illinois* v. *Vitale* (1980), _____ U.S. _____, 65 L. Ed. 2d 228, 100 S.Ct. 2260. Here, the State has made certain pretrial admissions as to the purposes which the State intends to introduce evidence at the reckless homicide trial that the Respondent crossed the median strip of the East-West Tollway. It was because of the revelations contained in the amended bill of particulars that the Illinois Supreme Court found the present case distinguishable from this Court's decision in *Illinois* v. *Vitale*, *supra*. It is Respondent's position that the decision of the Illinois Supreme Court is correct and that Court properly applied the principles of double jeopardy. Inasmuch as the Illinois Supreme Court relies upon certain pretrial pleadings in distinguishing *Vitale*, close examination of those pleadings is warranted.

The State admitted in paragraph 3 of the original bill of particulars that driving across the center line and median strip was one of the reckless acts which the State would use in proving the charge of reckless homicide. Clearly, if such were the circumstances, double jeopardy would bar the latter prosecution. However, the State later amended paragraph 3 to provide:

> "That the People do not, at this time, expect to rely upon the act of driving across the median strip per se as a reckless act of the defendant. The People do expect to introduce evidence that the defendant did actually cross the median strip *but only insofar as it is necessary to prove the allegations of the indictment, the*

> *remainder of the Bill of Particulars and the Additional Bill of Particulars.* Specifically, the People expect to introduce evidence that the defendant crossed the median strip in order to show the causal nexus between the defendant's conduct prior to actually crossing the median strip and the death of the two victims named in the indictment. *Also, such evidence will be introduced in support of the allegation that the defendant was driving too fast for conditions, failing to reduce speed to avoid a collision, failure to drive a vehicle in the proper lane of the roadway and improper passing on the left.*'' (emphasis added.)

The Illinois Supreme Court expressly relied upon the above quotation in support of its position that this Court's decision in *Illinois* v. *Vitale, supra*, was distinguishable. The State's additional bill of particulars contains further support for the Illinois Supreme Court's decision that prosecution of the Respondent for reckless homicide would violate the Double Jeopardy Clause.

The State clearly indicates in the additional bill of particulars that ''the median'' is one of the elements that the State will rely upon as constituting the act or occurrence of driving too fast for conditions. (Paragraph 1 of Additional Bill of Particulars.) Paragraph 2(a) of the additional bill states, *inter alia*, that Respondent's failure to decrease her speed while traveling across the median is an element of Failure to Reduce Speed to Avoid an Accident. (Paragraph 2(a) of Additional Bill of Particulars.) Similarly, paragraph 5(a) of the additional bill indicates that the Respondent's ''failing to apply her brakes while traveling across the median'' was one of the elements constituting failure to exercise due care for the safety of herself and others rightfully upon the roadway.

In introducing evidence of driving across the median strip as set forth by these various pretrial pleadings, the State would necessarily be proving each and every element of the offense defined by Section 11-708(d) of chapter 95 1/2 of the Illinois Revised Statutes. Reckless homicide does not always require proof of driving across the median strip and according to this Court's decision in *Illinois* v. *Vitale*, (1980), _____ U.S. at _____, 100 S. Ct. at 2267, 65 L. Ed. 2d at

237, the "*mere possibility* that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case could not be sufficient to bar the latter prosecution." (emphasis added.) But when the State admits that evidence establishing the offense of driving across a median strip will also be introduced to prove reckless homicide, there is no longer just a mere possibility, but an actual certainty. Under the principles set forth in *Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221, and *Harris* v. *Oklahoma* (1977), 433 U.S. 682, 53 L. Ed. 2d 1054, 97 S. Ct. 2912, in these circumstances the State would be violating the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution by prosecuting Respondent for reckless homicide. As was aptly stated in *Brown* v. *Ohio:*

> It has long been understood that separate statutory crimes need not be identical — either in constituent elements or in actual proof — in order to be the same within the meaning of the constitutional prohibition. [432 U.S. at 164, 97 S. Ct. at 2225, 53 L. Ed. 2d at 193].

In attempting to evade application of the Double Jeopardy Clause, the State engages in the expedient of segregating the occurrence of December 19, 1975 into several distinct parts and then limits the use of each part to suit its own design. Similar arguments were presented and rejected in *Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221. There the prosecution argued that the Defendant could be convicted of both offenses because the charges focused on different parts of a 9 day joy ride in a stolen automobile. In rejecting this claim, this Court stated:

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. [*Brown* v. *Ohio* 432 U.S. at 169, 97 S. Ct. at 2227, 53 L. Ed. 2d at 191].

Here, the alleged offense of reckless homicide arose out of one continuous sequence of events occurring over a time span of seconds,

not days. Yet, the State still insists that double jeopardy can be avoided by dividing a single crime lasting seconds into a series of distinct temporal or spacial units. If such machinations are countenanced as a means of avoiding the Double Jeopardy Clause, then that clause is indeed a fragile guaranty.

The State in its Petition claims that "unlike *Harris* v. *Oklahoma*, *supra*, it cannot be said a conviction for reckless homicide cannot be had without a conviction for crossing the median." (Petition for Writ of Certiorari, p. 12.) Such a claim ignores the pretrial admissions made by the State which establish that under the circumstances presented here, the State will prove the Respondent committed the offense of driving across the median strip in its prosecution of Respondent for reckless homicide.

The Illinois Supreme Court properly applied the principles of Double Jeopardy announced by this Court in *Brown* v. *Ohio*, *supra*, and *Harris* v. *Oklahoma*, *supra*. The pretrial admissions by the State distinguishes the instant case from this Court's decision in *Illinois* v. *Vitale*, *supra*.

Since the constitutional rights of the Respondent have been properly recognized and preserved by the judgment of the Illinois Supreme Court, no further review is merited. Respondent respectfully requests this Court deny the State's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of the State of Illinois should be denied.

Respectfully submitted,

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APPENDIX A

RESPONDENT'S MOTION FOR ADDITIONAL BILL OF PARTICULARS

AND

PETITIONER'S ADDITIONAL BILL OF PARTICULARS

STATE OF ILLINOIS)
COUNTY OF DU PAGE) ss.
)

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
Plaintiff,)
v.) No. 76 CF 1007
MARLA T. LENZA, now known as MARLA T. ZEGART,)
Defendant.)

MOTION FOR ADDITIONAL BILL OF PARTICULARS

Now comes the defendant, MARLA T. LENZA, now known as MARLA T. ZEGART, by and through her attorneys, LAW OFFICES OF A. E. BOTTI, for a Motion for Additional Bill of Particulars in accordance with Chapter 38, Section 1A-2(b) of the Illinois Revised Statutes and in support thereof, states as follows:

1. That the above matter is set for jury trial on January 17, 1977 at 9:30 a.m. in courtroom no. 304.

2. That on or about December 23, 1976 the State's Attorney of DuPage County by Assistant State's Attorney Thomas Knight served a copy of an additional Answer to Discovery in the above matter.

3. That said additional Answer to Discovery included an additional list of witnesses, additional scientific reports, and the existence of additional scientific evidence.

4. That on August 19, 1976 the defendant filed a Motion for a Bill of Particulars in this matter in accordance with Chapter 38, Section 111-6 of the Illinois Revised Statutes.

5. That on or about September 21, 1976 the State filed an Answer to the defendant's Bill of Particulars which Answer is vague, ambiguous and incomplete.

6. That on January 14, 1976 at approximately 1:00 p.m. the defendant appeared in court at 421 North County Farm Road, Wheaton, Illinois, and entered a plea of guilty to the charge of improper lane usage in violation of Chapter 95-1/2, Section 11-708 of the Illinois Revised Statutes. (DuPage County Case #L77591).

7. That upon said plea of guilty, the court, after admonishing the defendant of her various rights, entered a finding of guilty based upon the defendant's plea thereafter the court assessed a fine of $10.00 with costs and other fees assessed in the amount of $10.00.

8. That on said date and time and at said court, the State's Attorney of DuPage County, the Honorable John Bowman, by and through an Assistant State's Attorney prosecuted and convicted the above-named defendant of the improper lane usage charge arising from a fatal accident of December 19, 1975.

9. That in light of the complications regarding double jeopardy, the defendant alleges that additional particulars are necessary in order to properly aprise the defendant with specificity the nature of and the particulars relating to the charges in this matter so that the defendant may properly plead and defend this cause.

WHEREFORE, for the above and foregoing reasons, the defendant respectfully prays that the Court enter an Order granting

the defendant an Additional Bill of Particulars containing the following information:

1. That in reference to answer to Bill of Particulars No. 1, namely, Driving too Fast for Conditions, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. The conditions relied upon in the act or occurrence

e. The speed relied upon in the act or occurrence.

2. That in reference to answer to Bill of Particulars No. 2, namely, Failure to Reduce Speed to Avoid an Accident, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. The speed relied upon in the act or occurrence

e. The possible accident allegedly relied upon in the act or occurrence.

3. That in reference to answer to Bill of Particulars No. 3, namely, Driving Across the Center Line and Median Strip, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. As to what center line is relied upon in the act or occurrence

e. The particulars as to what median strip is relied upon in the act or occurrence.

4. That in reference to answer to Bill of Particulars No. 4, namely, Failure to Drive Her Vehicle in the Proper Lane of the Roadway, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. The particulars as to what lane of roadway is relied upon in the act or occurrence.

5. That in reference to answer to Bill of Particulars No. 5, namely, Failure to Exercise Due Care for the Safety of Herself and Others Rightfully upon the Roadway, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. The particulars as to what amount of care is relied upon by the State in the act or omission

e. The particulars as to who the others rightfully upon the roadway are as relied upon in the act or omission.

6. That in reference to answer to Bill of Particulars No. 6, namely, Improper Passing on the Right, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. The particulars as to what the State relies upon as improper in the act or occurrence

7. That in reference to answer to Bill of Particulars No. 7, namely, Improper Passing on the Left, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The time of day on the clock of each alleged act or occurrence

c. The exact street location of each act or occurrence

d. The particulars as to what the State relies upon as improper in the act or occurrence

8. That in reference to answer to Bill of Particulars No. 8, namely, Failure to Wear Prescription Lenses as Required by Her Driver's License, state the following:

a. The elements that the State will rely upon as constituting said act or occurrence

b. The Full and correct name of any and all witnesses who determined that the defendant was not wearing prescription lenses

c. Where said determination was made, what time said determination was made and when said determination was made.

STATE OF ILLINOIS)
) ss.
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
Plaintiff,)
v.) No. 76 CF 1007
MARLA T. LENZA, now known as MARLA T. ZEGART,)
Defendant.)

ADDITIONAL BILL OF PARTICULARS

Now come the People of the State of Illinois by J. MICHAEL FITZSIMMONS, State's Attorney for DuPage County, Illinois, pursuant to order of this Court and submit the following Additional Bill of Particulars in answer to the motion of the defendant for an Additional Bill of Particulars. The numbered paragraphs of this Bill are answers which correspond to the numbered paragraphs and subparagraphs of the defendant's motion for Additional Bill of Particulars.

1. a) The elements are: The roadway, the median, other traffic, the braking and turning capabilities of the defendant's vehicle, lighting conditions, time and speed.

   b) The time was approximately 6:40 to 6:45 P.M.

   c) The location was from approximately the Route 83 cloverleaf to approximately Milepost 153-1/4 on Illinois Route 5, also known as the East-West Tollway, eastbound in the eastbound

lanes, the shoulders, in the median and in the westbound lane just prior to the collision with the Raymond McJohn, Jr., vehicle.

d) The conditions are the highway, the median, other traffic, the braking and turning capability of the defendant's vehicle, lighting conditions, time and speed.

e) The speeds were varying between approximately 50 to 55 miles per hour to substantially faster than 55 miles per hour.

2. a) The elements are the defendant's failure to decrease her speed as she drew close to eastbound traffic ahead of her as she attempted to pass or merge with other eastbound vehicles, and as she left the eastbound lanes and traveled into the westbound lane.

b) The time was approximately 6:40 to 6:45 P.M.

c) The location was between approximately the Route 83 cloverleaf and approximately Milepost 153-1/4 on Illinois Route 5, also known as the East-West Tollway, eastbound in the eastbound lanes and in the median and in the westbound lane just prior to collision with the Raymond McJohn, Jr., vehicle.

d) The speeds were varying between approximately 50 to 55 miles per hour and substantially faster than 55 miles per hour.

e) The possible accidents are a collision with an eastbound truck referred to in Discovery, with an eastbound car referred to in Discovery as traveling approximately next to the truck, with a car driven by Lloyd Lundberg, with a car driven by Raymond McJohn, Jr., and with other westbound vehicles on Illinois Route 5 in that area at the time of defendant's conduct.

4. a) The elements are changing from lane to lane, from lane to shoulder, and from shoulder to lane without first ascertaining that such movement could be made with safety.

b) The time was approximately 6:40 to 6:45 P.M.

c) The location was from approximately Route 83 cloverleaf to approximately Milepost 153-1/4 on Illinois Route 5 eastbound.

d) The lanes involved were the two eastbound lanes and the right and left shoulders adjacent to those lanes.

5. a) The elements are driving onto the right shoulder of the roadway and too fast and too closely to the truck referred to in Discovery; driving from the right shoulder into the right hand driving lane behind the truck, too fast and too closely; changing from the right driving lane behind the truck into the left driving lane behind a car traveling approximately next to the truck at too fast a speed and too closely to those vehicles; and driving from the left lane as just described onto the left shoulder of the roadway and the unpaved area next to said roadway too fast and too closely to those vehicles; and by failing to apply her brakes while traveling across the median after running off of the roadway described above.

b) The time was approximately 6:40 to 6:45 P.M.

c) The location was approximately between Route 83 cloverleaf and approximately Milepost 153-1/4 on Illinois Route 5, also known as the East-West Tollway, eastbound in the eastbound lane, the shoulders and in the median adjacent to those lanes.

d) The request is not appropriate for a Bill of Particulars (See motion for protective order.)

e) The others rightfully upon the roadway are those persons in the truck and the car aforementioned and in the vehicle driven by Lloyd Lundberg and the persons in the vehicle driven by Raymond McJohn, Jr., and other persons in vehicles rightfully upon the roadway in the vicinity of the defendant's vehicle while she was engaged in the above-described conduct.

6. a) The elements are beginning to pass the above-mentioned truck on the right when such movement could not be made with safety and by driving off the main traveled portion of the roadway in so doing.

   b) The time was approximately 6:40 to 6:45 P.M.

   c) The location is approximately between Route 83 cloverleaf and approximately Milepost 153-1/4 on Illinois Route 5, also known as the East-West Tollway eastbound in the right hand eastbound lane and the right hand shoulder.

   d) The improper act is as stated in Paragraph 6 a) above.

7. a) The elements are beginning to pass on the left of the aforementioned truck and on the left of the car traveling approximately next to the aforementioned truck, while the defendant was not at a safe distance from those vehicles and by driving off of the main traveled portion of the roadway.

   b) The time was approximately 6:40 to 6:45 P.M.

   c) The location is approximately between Route 83 cloverleaf and approximately Milepost 153-1/4 on Illinois Route 5, also known as the East-West Tollway eastbound in the eastbound lanes and the left-hand shoulder and the unpaved area next to the shoulder.

   d) The impropriety of the act is stated in Paragraph 7 a).